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Supreme Court of the United States

OCTOBER TERM, 1952, No. 262

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

LIBRARY
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

October Term, 1952, No.....

Calmar Steamship Corporation,

Petitioner,

against

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Calmar Steamship Corporation, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated May 12, 1952, in the above entitled case.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It appears at pages 802-804 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

Statement of the Matter Involved.

This is a suit against the United States under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920 (41 Stat. 525) 46 U. S. C. 741 and 742, set forth in Appendix I.

The libel herein was filed in the United States District Court for the Southern District of New York in accordance with the ruling of this Court in *Matson Navigation Co. v. United States*, (1932) 284 U. S. 352.

The causes of action are founded on the time charter of SS. *Portmar* between petitioner, owner, and the United States Maritime Commission, charterer, dated as of November 21, 1941, and relate to damage sustained by the *Portmar* by enemy aerial attack in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

The Vessel

The *Portmar* was an American cargo vessel classed in Lloyd's Register of Shipping. The *Portmar* was a general cargo carrier and had never been used as anything else since petitioner acquired the vessel in 1930. Libelant's Exhibit 1, R. 580; R. 160.

The *Portmar* was owned, operated, manned and supplied by petitioner, and was navigated by merchant officers and seamen hired and paid by petitioner. R. 128, 133, 154. *Charter*, Art. 2.01 and 2.05 (see Appendix II), R. 32, 25.

The Charter

As of November 21, 1941 petitioner chartered the *Portmar* to the United States Maritime Commission by a time charter for one round voyage to the Philippine Islands and return. Said charter contained, among others, the provisions set forth in Appendix II.

The Voyage

Pursuant to Article 1.01 of said charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government as "lawful merchandise", under Article 2.01 of said charter.

After the Japanese attack on Pearl Harbor December 7, 1941, the *Portmar* was diverted by United States Naval orders to Suva in the Fiji Islands, there to take orders from the British Naval Authorities. The British naval authority at Suva ordered the *Portmar* to Sydney, Australia, there to report to the Australian Naval Control. After arrival at Sydney the *Portmar* moved, always under sovereign military orders, between various ports on the eastern and northern coasts of Australia.

While so engaged, the *Portmar* sustained slight damage by Japanese aerial attack on February 16, 1942 in the Timor Sea; and on February 19, 1942 at Port Darwin, Australia she was so heavily damaged by Japanese aerial attack that the Master was obliged to beach her to prevent her from sinking in the deep water of the harbor.

The United States military authorities in Australia later arranged for salvage and towage of the vessel to Brisbane, Australia.

The United States requisitioned title to the vessel in damaged condition on November 17, 1942 at Brisbane, Australia. The *Portmar* was never restored to her former condition but was patched up and used for military purposes. She was later sunk by a Japanese torpedo.

The Proceedings Below

The libel herein states the following causes of action against the United States:

1. Charter hire pursuant to Articles 1.02 and 2.04 of said charter, R. 19-20, 23-25, from date of the disaster, February 19, 1942 to date of the requisition, November 17, 1942.

2. Indemnity pursuant to Article 2.17 of said charter, R. 35, as to any amount not recoverable from the war risk underwriters of the *Portmar* by reason of termination or vitiation of the war risk insurance of the vessel or any additional premium allowed to said underwriters.

3. Indemnity pursuant to Article 2.11 of said charter, R. 28-29, as to any damage or loss arising from compliance with orders or directions of the United States or its agents given pursuant to Article 2.11 of said charter or any article of said charter.

Except insofar as it is maintained for the benefit of the subrogated war risk underwriters, it is alternative to the action instituted by petitioner against the war risk underwriters of the *Portmar* in the United States District Court for the Southern District of New York entitled *Calmar Steamship Corporation, Libelant,* v. *Sydney Keith Scott, et al., Respondents,* Ad.-133-332. That suit claimed recovery for a constructive total loss in the full amount of the insurance, $860,000.00, and in addition for sue and labor charges and salvage award paid, with interest, and in the alternative for a partial loss.

The cases were tried together and decided by the District Court on May 25, 1951 in one opinion. R. 700-756. The District Court directed that the appeals proceed on a single printed record. R. 789. The appeals in both cases were decided on May 12, 1952 in one opinion. R. 792-804.

The Decisions Below

The District Court held that the Court had jurisdiction over all claims arising out of the charter of the *Portmar* under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920, 46 U. S. C. 741 and 742; that the *Portmar* was operated "for the United States"; that the *Portmar* was not owned by the United States; that the charter provided that the vessel should be operated by the owner and not by the charterer; that the charter was not a demise of the vessel; that the *Portmar* was employed as a merchant vessel, being privately owned and operated for the profit of the owner, in charge of a Master and crew selected by the owner and responsible to it alone; and that the nature of the cargo did not change the merchant character of the vessel. R. 742-744.

The District Court further held, however, that the intent of the charter was that the United States was not to be liable for any loss covered by the war risk insurance provided for in the charter; that the *Portmar* did not sustain any loss or damage from any cause which would render the United States liable therefor under the charter; and accordingly, because of recovery allowed to petitioner against the war risk underwriters, disallowed the libel herein except as to petitioner's claim in the case of victualling supercargoes pursuant to Article 1.02 of said charter in the sum of $238.50 for which recovery was allowed (R. 744, 756).

The District Court allowed full recovery to the petitioner in the action against the war risk underwriters above mentioned, and in that action the war risk underwriters appealed.

The United States appealed herein on the point of jurisdiction, R. 782-784. Petitioner also appealed (R. 778) but its

assignments of error were only provisional (R. 779-781) in order to protect its position in the event that the decision of the District Court in the action against the war risk underwriters should not be in all respects affirmed.

In the present case the United States Court of Appeals held, as did the District Court, that the *Portmar* was operated "for the United States" as provided by Section 1 of the Suits in Admiralty Act, 1920, (R. 742, 803) but reversed the decision below, holding that the District Court had not any jurisdiction of the causes of action alleged in the libel because the *Portmar* was not "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, by reason of the nature of the cargo shipped at San Francisco under the charter.

In the action against the war risk underwriters the United States Court of Appeals reversed the decision below and directed that the libel be dismissed, holding that the war risk insurance had terminated before the loss occurred.

Thus Petitioner was deprived of recovery against the war risk underwriters and was also denied on jurisdictional grounds any alternative recovery in the District Court against the United States in the present suit.*

Jurisdiction

The jurisdiction of this Court to review this case on a writ of certiorari is provided by Title 28, United States Code, Section 1254.

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* On January 15, 1948 Calmar Steamship Corporation instituted suit now pending against the United States in the Court of Claims, No. 48509. The first three causes of action of the petition in that suit parallel those alleged in the libel in the present case because the Government's answer herein raised the issue of jurisdiction. R. 18, 44.

Questions Presented*

1. Whether the United States District Court for the Southern District of New York has jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 741 and 742, in a suit against the United States on a claim arising from the operation for the United States, under a time charter for the carriage of "lawful merchandise" for hire, of a privately owned, manned and operated American cargo vessel, carrying military equipment and supplies shipped as "lawful merchandise" by the United States under said charter.

2. Whether a privately owned, manned and operated American cargo vessel, operated for the United States under a time charter for the carriage of "lawful merchandise" for hire, is deprived of her character as a merchant vessel, so as not to be "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, because the Government elects to ship on said vessel military equipment and supplies as "lawful merchandise" under said charter.

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* If this petition is granted, Petitioner reserves for submission to this Court the following questions on the merits:

(a) Whether the United States is liable to Calmar Steamship Corporation for charter hire from February 19, 1942 to noon, Australia time, November 17, 1942, the date on which the United States requisitioned title to the *Portmar;*

(b) Whether the United States is liable to indemnify Calmar Steamship Corporation pursuant to Article 2.17 of said charter (see Appendix II) against any loss not recoverable from the war risk underwriters by reason of (1) vitiation or termination of the war risk insurance before the loss or (2) additional premium allowed to the war risk underwriters.

(c) Whether the United States is liable to indemnify Calmar Steamship Corporation pursuant to Article 2.11 of said charter, (see Appendix II) against any liability or loss arising from compliance with orders given by the United States or its representative even though such orders were given as a souvereign.

Reasons for Allowance of Writ of Certiorari.

1. The decision of the United States Court of Appeals herein affects an important question of Federal law, which has not been, but should be, settled by this Court, as to the meaning of "employed as a merchant vessel" as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742.

2. The decision of the United States Court of Appeals herein affects an important question of Federal law, which has not been, but should be, settled by this Court, in that it excludes from the jurisdiction of the District Court under the Suits in Admiralty Act, 1920, any cause of action against the United States which may arise under a time or voyage charter to the United States or any of its agencies, of a privately owned, manned and operated American cargo vessel, if such vessel carries military equipment and supplies shipped as lawful merchandise under such charter.

3. The proper forum for a suit against the United States on a maritime cause of action as presented herein, should be determined by this Court.

4. The decision of the United States Court of Appeals herein is in conflict with applicable decisions of this Court in which it has been held that the Suits in Admiralty Act, 1920, 46 U. S. C. 741 et seq. was designed by Congress to apply to one of the two classes of vessels, i.e. those of the character of merchant vessels, as distinguished from public vessels, with respect to suits maintainable against the United States on maritime causes of action. *James Shewan & Sons, Inc.* v. *United States* (1924), 266 U. S. 108, 111-112; *Eastern Transportation Co.* v. *United States* (1927), 272 U. S. 675, 691-692.

5. The decision of the United States Court of Appeals herein is in conflict with the intent of Congress shown by Committee reports, hearings and Congressional proceedings relating to, and preceding the passage of, the Act.

6. The United States Court of Appeals herein erred in holding, without prior authority, that a privately owned, manned and operated vessel was not "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, because it carried military equipment and supplies, notwithstanding such cargo was shipped by the Government as "lawful merchandise" under a time charter of said vessel to the United States providing for the carriage of "lawful merchandise". The cases cited in the opinion below as authority for that holding involve only vessels owned, either legally or *pro hac vice*, by the United States, and operated by the United States, and it does not appear that said vessels carried merchandise for hire.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

Dated New York, August 5, 1952.

CALMAR STEAMSHIP CORPORATION

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEREIN AFFECTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The questions presented turn on the interpretation of the words "employed as a merchant vessel" as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742. They affect the basis of jurisdiction of the United States District Courts in Admiralty as conferred by that statute with respect to maritime causes of action against the United States.

But what is far more important, as a matter of national security, they involve the issue whether privately owned vessels, while committed by time charter to the service of the United States and carrying full Government cargoes for hire under such charters, are to be made subject to arrest by process *in rem*. Such vessels are certainly not entitled to the sovereign immunity enjoyed by "public vessels". Therefore, if they are not protected by the Suits in Admiralty Act and rendered immune from arrest by Section 1 of that Act, they are open to restraint and delay by legal process, a result which is directly contrary to the intent of Congress and the declared purposes of the Suits in Admiralty Act.

There can be no serious question as to the importance of the questions involved.

In *Eastern Transportation Company* v. *United States*, (1927) 272 U. S. 675 the question turned on the construction of the phrase here involved, under different facts. At page 692 of the opinion, Mr. Chief Justice Taft referred to the question as "the important question now before us".

The whole field in which privately owned American cargo vessels are operated for the United States under time charter or voyage charter to the United States, carrying goods, merchandise or military supplies and equipment, for compensation in the form of charter hire under a time charter or voyage freight under a voyage charter, is excluded from the jurisdiction of the United States District Courts by the decision below.

There is a broad possibility of claims against the United States arising under such charters. To close the District Courts to all such claims on the ground that such vessels are not "employed as merchant vessels", gives rise to a question of considerable importance.

It has been strongly indicated by this Court in *Matson Navigation Company* v. *United States* (1932), 284 U. S. 352, that suits against the United States on maritime causes of action with respect to vessels operated for the United States and employed as merchant vessels belong in the District Courts, not in the Court of Claims, because of the exclusive jurisdiction of the District Courts under the Suits in Admiralty Act, 1920. See also *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Brothers & Company*, (1928) 276 U. S. 202, 214; *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation, et al*, (1930) 280 U. S. 320, 326-327.

The effect of the decision below will be to exclude from the District Courts all maritime claims arising under time charters and voyage charters to the United States of vessels

operated for the United States carying Government stores and supplies as "lawful merchandise" for hire, and forcing such claims into the Court of Claims if the amount involved exceeds $10,000, the limit of jurisdiction of the District Courts in civil actions under the Tucker Act, 28 U. S. C. 1346.

It is therefore submitted that the question as to jurisdiction of the District Court of the present suit under the Suits in Admiralty Act, 1920 is an important question which should receive the consideration of this Court.*

II.

THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT THE *Portmar* WAS NOT "EMPLOYED AS A MERCHANT VESSEL" WITHIN THE MEANING OF THOSE WORDS AS FOUND IN SECTION 2 OF THE SUITS IN ADMIRALTY ACT, 1920, 46 U. S. C. 742.

The decision below was founded on the fact that the vessel loaded at San Francisco, and carried on the voyage, military equipment and supplies. R. 802-803.

But the Court below failed to take account of the fact that said military equipment and supplies were loaded pur-

* There is also a serious question, which does not affect petitioner's pending suits, but which will affect other litigants in suits against the United States on similar facts. The Court of Claims no longer has jurisdiction of any claim as to which any suit against the United States is pending in any other Court. 28 U. S. C. 1500, in effect September 1, 1948. In *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352, as here, suits were maintained in both the District Court and in the Court of Claims. Suits against the United States on the same cause of action in both District Court and Court of Claims may no longer be maintained. The litigant must choose at his peril, especially in view of the two year suit limit of Section 5 of the Suits in Admiralty Act, 46 U. S. C. 745.

suant to a charter for the carriage of a full cargo of "lawful merchandise" for hire. *Charter*, Articles 1.02, 2.01, 2.03, R. 19-20, 22-23 (*post*, Appendix II).

Prior decisions of this Court.

The cases cited as authority by the Court of Appeals below (R. 803) did not involve "the same point" as stated by the Court, but were on entirely different facts. The vessels in all those cases were either owned outright by the United States, or as to which the United States was owner *pro hac vice* by demise charter. In each case the vessel was manned by a crew hired and paid by the United States. None of those cases involved Government supplies carried for hire.

So far as we are aware there is no appellate decision, prior to the decision below, holding that a privately owned, privately manned and privately operated vessel is not "employed as a merchant vessel" because she carries military equipment and supplies as "lawful merchandise" for hire. There is, however, a District Court decision which has construed the similar words of Section 9 of the Shipping Act 1916 "employed solely as a merchant vessel", on facts similar to those here involved. In that case it was held that carriage of Government goods does not deprive the vessel of her merchant character. *The Nishmaha* (D. Ore. 1920) 263 Fed. 959.

The decision below, excluding the present case from the jurisdiction of the District Court under the Suits in Admiralty Act, 1920, is demonstrably unsound under the authorities.

It is clear from [redacted] decisions of this Court and the provisions of the Public Vessels Act, 1925, that the broad plan which underlies the Suits in Admiralty Act, 1920 and

the Public Vessels Act, 1925, 46 U. S. C. 781, 782, is to confer jurisdiction on the District Courts over maritime causes of action against the United States as to public or merchant vessels operated by or for the United States.

James Shewan & Sons, Inc. v. *United States,* (1924) 266 U. S. 108;

Eastern Transportation Company v. *United States et al,* (1927) 272 U. S. 675;

United States Shipping Board Emergency Fleet Corporation v. *Rosenberg Brothers & Company,* (1928) 276 U. S. 202, 214;

Johnson v. *U. S. Shipping Board Emergency Fleet Corporation, et al,* (1930) 280 U. S. 320, 326-327.

In the Suits in Admiralty Act, jurisdiction is conferred as to all maritime causes of action. In the Public Vessels Act, jurisdiction is conferred as to damage caused by a public vessel, and for compensation for towage and salvage rendered to a public vessel.

The decisions show that all such vessels are divided into two classes. (1) public vessels and (2) vessels employed as merchant vessels.

In the first class lie all vessels owned by the United States legally or *pro hac vice,* manned and operated by the United States, not carrying cargoes or passengers for hire. In the second class lie all vessels engaged in the business of carriage of cargo or passengers for hire, even though owned and operated by the United States.*

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* Vessels owned by the United States, either outright or as owner *pro hac vice* under demise charter, and operated for Government account carrying Government munitions or goods, not for compensation by payment of freight or hire, are public vessels. *The*

In *James Shewan & Sons, Inc.* v. *United States*, (1924) 266 U. S. 108, the question was as to jurisdiction under the Suits in Admiralty Act in a case involving a vessel which was owned by the United States but which had last been employed in the merchant service. At the time the libel was filed, the vessel was in the laid-up fleet of the Shipping Board, carrying neither crew or cargo. The District Court dismissed the libel for lack of jurisdiction on the ground that the vessel at the time the libel was filed was not "employed as a merchant vessel". This Court, on direct appeal, reversed the decree, holding that the words "provided that such vessel is employed as a merchant vessel" as found in Section 2 of the Act, "may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such. Thus construed, § 2 gives the District Court jurisdiction in such a case as this."

In reaching that conclusion and in discussing the terms of Section 9 of the Shipping Act, 1916 (to which the Court of Appeals herein also referred), this Court said, 266 U. S. at pages 111-113 (italics ours):

> "We do not find anything in the Act of 1916 which would prevent its liberal construction to enable one who had repaired a vessel engaged solely as a merchant vessel for the United States from proceeding against that vessel *in rem* under the Act

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Western Maid, (1922) 257 U. S. 419; *U. S. Grain Corporation* v. *Philips*, (1922) 261 U. S. 106.

Vessels even though owned by the United States which are engaged in the carriage of goods for hire or which last have been, or are next to be, in that service, are "employed as merchant vessels". *The Lake Monroe*, (1919) 250 U. S. 246; *James Shewan & Son Inc.* v. *United States*, (1924) 266 U. S. 108; *Eastern Transportation Company* v. *United States, et al.*, (1927) 272 U. S. 675; *Adams, et al.* v. *United States*, (D. Mass. 1922) 281 Fed. 895; *The Jeanette Skinner*, (DMd. 1919) 258 Fed. 768.

of 1916, even though, after the repairs had been made upon her as a commercial vessel, she was subsequently laid up, if she had not then acquired character as a public vessel. So we do not think that the decision in *The Lake Monroe*, 250 U. S. 246, would have been different had she thus been laid up after she had injured the libelant's vessel in that case. Obviously, under the Act of 1916, liability to suit of a vessel owned or controlled by the United States as a merchant vessel depended primarily, not upon the time when the suit was to be brought and the vessel was to be seized, *but upon her character as one solely engaged in merchant service* when the transaction occurred out of which the liability grew. * * * The date of the suit would be important only in the application of a statute of limitation or a *change in character of the vessel from that of a merchant vessel to public vessel,* * * * *The important line between immunity from judicial seizure of government vessels under the Act of 1916 was between public vessels and those engaged in merchant service. The mere laying up of a vessel engaged in the latter service would not change its character,* unless the Government did something affirmative to make it a public vessel. * * * In view of the relation of the Act of 1920 to the Act of 1916, unless the words of the proviso of §2 of the Act of 1920 make any other construction unreasonable, the mere laying up of the vessel before suit brought under the act should not prevent a libel *in personam* against the United States for a claim which under the Act of 1916 might be enforced against the vessel itself. *The words of the proviso may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such.* * * *"*

Thus the test is as to the *character* of the vessel as between two categories, that of public vessels and that of vessels employed as merchant vessels.

Later, in *Eastern Transportation Company* v. *United States et al.* (1927), 272 U. S. 675, this Court held that the Suits in Admiralty Act conferred a right of action against the United States in admiralty for damage to a barge and her cargo by collision with a sunken Government vessel which before her loss was last owned and used by the United States solely as a merchant vessel. The Government contended that the vessel which caused the damage was a wreck and was not at the time employed as a merchant vessel; thus that the District Court had not any jurisdiction under the Act.

The District Court dismissed the libel for lack of jurisdiction. On direct appeal to this Court the decree was reversed. In holding that the Suits in Admiralty Act, 1920 conferred jurisdiction under the circumstances above stated, this Court said at 272 U. S. at page 692 (italics ours):

> "* * * What the statute means by saying 'employed as a merchant vessel,' is that the vessel shall *belong to that class as distinguished from one employed in the governmental service*—not necessarily that it shall be actively thus employed at the time of the collision. *Shewan & Sons* v. *United States*, supra. * * *"

Thus this Court stated the two categories, merchant vessels and public vessels.

This division of the types of vessels into two classes was followed in *United States* v. *Caffey*, (2 Cir. 1944) 141 F. 2d. 69; *State of Maine* v. *United States*, (1 Cir. 1943) 134 F. 2d 574; *Olavarria & Co.* v. *United States*, (SDNY 1944) 56 F. Supp. 758, 763; *The Jeanette Skinner*, (DMd. 1919) 258 Fed. 768; *Adams et al.* v. *United States* (DMass. 1922) 28 Fed. 895.

The Government argued before the Court of Appeals below that the *Portmar* could not be classified as a public

vessel of the United States, and that even though she were, the suit could not be maintained under the Public Vessels Act, 1925, 46 USC. 781 because that Act confers only a remedy "for damages caused by a public vessel * * * and for compensation for towage and salvage services * * *" rendered to a public vessel. Thus the Government contended that the *Portmar* was neither a public vessel, nor employed as a merchant vessel. We argued that under the decisions there is no middle ground. The Court of Appeals however, failing to appreciate that the two categories above mentioned exhaust the field, made the following statement in the course of the decision, R. 803:

> "We cannot understand what is the significance of the fact that the *'Portmar'* was not a 'public vessel' and that no suit would lie under the 'Public Vessels Act,' * * * unless the argument be that, if there be no relief under either the Suits in Admiralty Act or the Public Vessels Act, we should assume that a suit will lie for the *casus omissus*. * * *"

No such argument was made by us. The Court below did not appreciate that the exclusion of the *Portmar* from the category of public vessels necessarily put her in the category of vessels employed as merchant vessels. The decisions already cited do not allow any theory that there is a twilight zone between the two, and that as to such unclassified vessels, operated "for the United States," Congress has provided no jurisdiction in the District Court for suits against the United States on maritime causes of action.

The intent of Congress.

The genesis of the Suits in Admiralty Act was the ruling of this Court in *The Lake Monroe* (1919), 250 U. S. 246

under Section 9 of the Shipping Act 1916, which related to vessels "employed solely as merchant vessels".

The report from the Committee on Commerce, to accompany S. 3076, the Senate bill which as amended was later enacted as the Suits in Admiralty Act, 1920, refers to the decision in *The Lake Monroe* and points out that this Court held in that case that if a vessel owned by the United States carries cargo under a charter or other agreement for a stipulated rate of freight or hire, her service is purely commercial, and that such a vessel, even though Government owned, is subject to arrest under process *in rem*, and the ordinary liability of a merchant vessel, by reason of the terms of Section 9 of the Shipping Act of 1916. Senate report No. 223, 66th Congress, 1st Session, concludes with the following:

> "The result of this is to subject the United States to unnecessary expense and its vessels to great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels."

The deliberations which preceded the passage of the Suits in Admiralty Act, 1920, contained unmistakable indications that the intent was to confer immunity from arrest on, and jurisdiction on the District Courts as to, all vessels operated for the United States, which are not public vessels. The meaning of the words "employed as a merchant vessel" as laid down in the decisions in this Court, already discussed, was exactly in line with the intent of Congress in the passage of the Act.

During the hearings before the House Committee on the Judiciary, 66th Congress, 1st Session, November 13,

1919 at page 45, Charles F. Dutch, Admiralty Counsel to the Shipping Board, said that the bill (S. 3076) "* * * is confined to actions where the vessel was under an actual commitment for the carriage of goods or passengers for hire."

On January 17, 1920, on the floor of the House, Representative Andrew J. Volstead, Chairman of the House Committee on the Judiciary, when the House had S. 3076 under consideration, stated the purposes of the proposed measure in colloquy with Representative Walsh of Massachusetts and Representative White of Maine as follows (*Cong. Rec.* Vol. 59, Part 2, page 1680) (Italics ours):

> "Mr. Walsh. Will the gentleman yield for a question?
>
> Mr. Volstead. I will.
>
> Mr. Walsh. The bill as reported by the committee restricts this right to sue for damages resulting from collision or otherwise to damages received as the result of the operation of merchant ships by the United States Government. It does not include vessels of war or other vessels owned by different departments of the Government.
>
> Mr. Volstead. *No; it simply covers merchant vessels. The committee had extensive hearings, because a great many parties insisted that we ought to extend it so as to embrace naval vessels, so called, and other vessels of the Government not engaged in commerce.* Of course, we have a very large number of those vessels. My understanding is that perhaps some effort will be made upon the floor to include those, but we will try to cross that bridge when we reach it. The Committee on the Judiciary concluded *that it ought not in this bill include anything but merchant ships.* This is in the nature of an emergency measure. I believe that if we are to consider the other phase of this shipping matter, we ought to

do it in a separate measure and ought to consider it carefully, because I can see there may be many complications we ought to take care of, such as those which necessarily must arise during war and from conditions that do not affect the ordinary merchant ships."

Later, on January 19, 1920, the following discussion between Representative Bankhead of Alabama and Representative Walsh of Massachusetts occurred on the floor of the House (*Cong. Rec.*, Vol. 59, Part 2, page 1751) (Italics ours):

"Mr. Bankhead. It seems to me, taking into consideration the fact that section 2 only relates to one specific phase of the general purpose in view, the gentlemen's proposition is not good that this bill relates to only one class of merchant vessels.

Mr. Walsh. The gentleman stopped too soon in the reading of the title.

Mr. Bankhead. In what particular?

Mr. Walsh. He said, 'authorizing suits against the United States in admiralty.' It also says:

Suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Now, it is not limited to just suits in admiralty. It declares immunity and also relates to stipulations as to the release of various public vessels from arrest. *But throughout the entire bill, Mr. Chairman, from first line to the last, the clear intent and purpose is to restrict it to merchant vessels, vessels employed in carrying cargo for hire, or intended to be so employed. There is nothing in here that can be construed to include battleships, submarines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government.*"

On February 23, 1920 the Managers of the Committee of Conference submitted a Conference Report on S. 3076 which set forth the bill in the form in which it was finally enacted. In report, No. 669, 66th Congress, 2nd Session, the Managers on the part of the House made a statement which contained among, other things, the following:

> "1. Section 1 of the House amendment has been rewritten. As amended, it eliminates the provision declaring all vessels of the United States to be public vessels, and excludes the Panama Railway Co. from the operation of the bill.
>
> 2. In section 2 the words 'or intended to be employed in the carriage of cargoes or of passengers for hire' have been stricken out, and the words 'as a merchant vessel or as a tugboat operated by such corporation.' The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act."*

Thus was shown the importance of the carriage of property for hire as determining the scope and jurisdiction of the District Courts under the proposed bill.

The deliberations in Congress show beyond question that the Congressional intent never included any category or classification other than public vessels of the United States on one hand, and all vessels employed as merchant vessels on the other. It is clearly shown that the public vessels of the United States refer to "battleships, sub-

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* The words "substituted therefor" or words to that effect, were apparently omitted after the word "corporation" in the fifth line of this paragraph.

marines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government"; and that the words "employed as a merchant vessel" referred to "vessels employed in carrying cargo for hire, or intended to be so employed." *Cong. Rec. Vol. 59, Part 2,* page 1751, quoted *ante,* p. 23. Compare *The Nishmaha* (D. Ore. 1920) 263 Fed. 959 as to the meaning of the similar words in Section 9 of the Shipping Act, 1916.

There is no indication whatever of Congressional intent that a cargo vessel usually employed in the carriage of cargo for hire would lose her character as a merchant vessel if she should be engaged in the carriage of Government cargo for hire. Her merchant character is fixed by her employment in the earning of money for her owner by the carriage of cargo for hire. There is no indication of Congressional intent that the nature of the cargo which she carries *for hire* would make the slightest difference in her status or character for the purposes of the Act.

After all, the cargo on board the *Portmar* was Government-owned, and it was vital in the public interest that such cargo reach its destination without interference. If the *Portmar* was subject to arrest while so engaged, the carriage of that cargo might have been seriously interrupted. It was in such a situation, among others, that the Suits in Admiralty Act was designed to confer immunity of the vessel from arrest. The vessel was being operated "for the United States", being committed to the carriage of Government goods and stores, and it was just as important in the public interest that the *Portmar* should be immune from arrest while so engaged, as that her cargo should be immune from arrest, as it clearly was. What good would immunity of the cargo accomplish if the vessel

It is clearly within the scope of the Act, and of the intent of Congress in the passage of the Act, that a privately owned vessel while engaged in the business of carrying a full cargo of Government goods for hire and thus "employed as a merchant vessel" should be immune from arrest, and that jurisdiction of a claim against the United States, as here presented, should lie in the District Court. *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352.

Conclusion.

THE QUESTIONS STATED IN THE PETITION SHOULD BE SETTLED BY THIS COURT.

A writ of certiorari should be issued in accordance with the prayer of the foregoing petition.

Dated New York, August 5, 1952.

Respectfully submitted,

EDWIN S. MURPHY,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

APPENDIX I.

Pertinent provisions of the Suits in Admiralty Act, March 9, 1920, 41 Stat. 525, Secs. 1 and 2 (46 U. S. C. 741-742):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found * * *"

APPENDIX H.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

WITNESSETH:

WHEREAS:

I. The Charterer has determined, pursuant to the provisions of an Act of Congress approved June 6, 1941 (Public Law 101—77th Congress), that vessels in addition to those otherwise available are necessary for transportation of foreign commerce of the United States, or of commodities essential to the national defense;

II. The Charterer deems the terms and conditions hereof and the period of this Charter and the restrictions herein

contained to be necessary or desirable for the protection of the public interest and the rate of hire herein provided to be fair and reasonable.

NOW, THEREFORE, the Owner and Charterer agree:

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. * * *

* * * * *

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

* * * *

PART II.

ARTICLE 2.01. The Vessel shall be placed at the disposal of the Charterer at the port of delivery at such safe ready dock, wharf or place as the Charterer may direct. Any time lost by the Vessel awaiting the availability of such dock, wharf or place shall count as time on hire. The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it

so, tight, staunch, strong and in every way fitted for service, having water ballast, winches and power sufficient to run all the winches at one and the same time and a Master and a full complement of officers and crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. The Vessel shall be employed in carrying lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct.

ARTICLE 2.02. The whole reach and burthen of the Vessel's holds, decks, and usual places of loading (but not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only space proper and sufficient in the opinion of the Master for Vessel's officers and crew, Master's cabin, tackle, apparel, furniture, provisions, fresh water, stores and fuel.

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time . . .

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or * * *

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

* * *

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or * * *

* * *

* * * Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (except as herein otherwise provided); 25% of all fresh water used by the Vessel if a steamer, or 75% if a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel.

ARTICLE 2.06. The Charterer shall (except as herein otherwise provided) provide and pay for: all fuel (except for cooking) 75% of all fresh water (except water ballast) if the Vessel is a steamer, or 25% if a motorship; all port charges, pilotages, light, dock, canal and other dues, stevedoring, agencies, commissions, reasonable ballast, (except water ballast, and the cost of loading and discharging it); tug assistance and boating where incurred for the Charterer's business, and all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner. * * *

* * *

ARTICLE 2.10. The Charterer shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, * * *

ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with Ship's crew and boats; and shall use due diligence in caring for and ventilating the cargo. The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; and Charterer shall load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, shall be deemed the agents of the Charterer, except in so far as such supervision pertains to the safety of the Vessel. * * *

The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

* * *

ARTICLE 2.16. The Vessel, her Master and Owner, shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: * * * fire, unless caused by the personal design or neglect of the Owner; * * * stranding, or peril, danger or accident of the sea or other navigable waters; * * * or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her master or Owner, nor the Charterer, shall unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter.

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured * * *

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

* * *

ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer.

* * *

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; * * *